Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *et al*,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Ysleta del Sur Pueblo, a federally recognized Indian tribe, has engaged in gaming activities since 1993, greatly improving the impoverished lives of its members and benefitting the local community. Relying on the gaming provisions of the Pueblo's Restoration Act, 25 U.S.C. § 1300g-6, the Attorney General of Texas has sued to enjoin the activities.

QUESTIONS PRESENTED

1. Did Congress unequivocally express an intent to abrogate Petitioners' tribal-sovereign immunity from suit by providing in section 1300g-6(c) that "nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section"?

2. Did Congress condition the bringing of a suit under such abrogation, if any, upon the authorization by the state legislature?

3. Does the abrogation of immunity in section 1300g-6(c), if any, extend to state law causes of action?

LIST OF PARTIES

State of Texas

John Cornyn,
Attorney General

Ysleta del Sur Pueblo,
a federally recognized Indian tribe, 25 U.S.C. § 1300g *et seq.*

Tigua Gaming Agency,
a regulatory agency of the Pueblo

Tribal Council,
the governing body of the Pueblo, 25 U.S.C. § 1300g-3(b)

Albert Alvidrez,
Tribal Governor (although not a Petitioner, Governor Alvidrez was added as a Defendant in the State's Second Amended Complaint filed 15 February 2001, and is being disclosed for the sake of completeness)

Filbert Candelaria,
Lieutenant Governor (sued originally as interim acting-Governor)

Francisco Hernandez,
Gaming Commissioner

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2. Did Congress condition the bringing of a suit under such abrogation, if any, upon the authorization by the state legislature?
3. Does the abrogation of immunity in section 1300g-6(c), if any, extend to state law causes of action?

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PETITION FOR A WRIT OF CERTIORARI

Come now Ysleta del Sur Pueblo, the Tigua Gaming Agency, the Tribal Council, Filbert Candelaria, and Francisco Hernandez seeking certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, and would respectfully show unto the honorable Court as follows:

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit was entered on 31 October 2000, Appendix at 1a. The motions for rehearing and rehearing en banc were denied on 12 December 2000, Appendix at 6a. Although this is an interlocutory appeal, the jurisdiction of this Court is invoked pursuant to the *Cohens* [1] doctrine under 28 U.S.C. § 1254(1) because it involves the denial of the immunity from suit claims of an Indian tribe and its agencies and officials.

[1] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

OPINIONS BELOW

Petitioners appealed two orders of the United States District Court for the Western District of Texas, both of which denied their claims of immunity from suit. The 3 December 1999 order is reported at 79 F. Supp. 2d. 708, Appendix at 8a-19a. The 13 January 2000 order, Appendix at 20a -27a, is not reported, and neither is the opinion of the Fifth Circuit affirming the district court's rulings, Appendix at 3a-5a.

STATUTORY PROVISIONS

The pertinent statutory provisions, 25 U.S.C. §§ 1300g-4(f) and 1300g-6, are set out at pages 28a-29a of the Appendix.

STATEMENT OF THE CASE

Petitioner Ysleta del Sur Pueblo is a federally recognized Indian tribe whose reservation is in El Paso County, Texas. See 25 U.S.C. § 1300g *et seq*. Petitioner Tribal Council is the governing body of the Pueblo. 25 U.S.C. § 1300g-3(b). Petitioner Filbert Candelaria is a member of the Tribal Council and is sued as such. Petitioner Tigua Gaming Agency is a tribal agency charged with regulating the Pueblo's gaming activities. Petitioner Francisco Hernandez is the Pueblo's Gaming Commissioner, *i.e.* head of the Tigua Gaming Agency, and is sued as such.

In 1968 the United States recognized the Tiwa Indians of the Ysleta del Sur Pueblo as an Indian tribe and at the same time transferred its trust responsibilities for the Pueblo to the State of Texas. Tiwa Indians Act, Pub. L. No. 90-287, 82 Stat. 93 (1968). In 1983, the United States and the Pueblo initiated steps to restore federal trust status to the Pueblo. In 1987, Congress passed the Ysleta del Sur Pueblo and Alabama Coushatta Indian Tribes of Texas Restoration Act ("Restoration Act"). *See* 25 U.S.C. § 1300g *et seq*. (codification of those provisions pertaining to the Pueblo).

Although the Act granted the State of Texas Public Law 280 type jurisdiction over the Pueblo's reservation, 25 U.S.C. § 1300g-4(f), it also contained specific provisions limiting the extent of that jurisdiction over gaming activities by the Pueblo. *See* 25 U.S.C. § 1300g-6.

In 1988, Congress created a nationwide, federal regulatory system governing gaming on Indian land, known as the Indian Gaming Regulatory Act ("IGRA"), codified at 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. § 1166 *et seq.* Class III gaming [2] on Indian land is lawful if authorized by a tribe located in a state which "permits such gaming for any purpose by any person, organization or entity," and if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe." 25 U.S.C. § 2701(d)(1).

After attempting to engage the governor of Texas in negotiations for a Tribal-State Compact for more than a year, in 1993 the Pueblo sued the State of Texas and, in the alternative, its governor seeking a declaration that the State had failed to negotiate in good faith for a compact, and an order granting the Pueblo the specific remedies provided by IGRA. 25 U.S.C.§ 2710(d)(7). The State and its governor moved to dismiss the Pueblo's complaint, claiming that the Tenth and Eleventh Amendments barred suit. The district court denied the motion. In cross-motions for summary judgment, the parties raised the issues of whether Texas law permitted the requested gaming activities [3] and whether the Restoration Act prohibited gaming activities on the Pueblo's reservation.

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[2] IGRA divides gaming into three classes. Class III gaming is gaming that is neither social or traditional Class I gaming, nor within the various bingo, pull tab, and card games which are authorized as Class II gaming under the statute. *See* 25 U.S.C. § 2703(6)-(8).

[3] The requested gaming activities were baccarat, blackjack, "craps" (dice), roulette, and slot machines.

The district court granted the Pueblo's motion for summary judgment holding the requested gaming activities were permitted under Texas law and thus were a proper subject for the tribal-state negotiations contemplated by IGRA. *Ysleta del Sur Pueblo v. Texas*, 852 F. Supp. 587 (W.D. Tex. 1993). The State and its governor appealed.

The Fifth Circuit held that the Restoration Act, not IGRA, governed gaming by the Tribe and, since the Restoration Act did not abrogate the State's Eleventh Amendment immunity, it ordered the Pueblo's suit be dismissed for lack of jurisdiction. *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1994).

Prior to the Fifth Circuit's ruling, the Pueblo, in good faith and with full knowledge of the State of Texas, commenced Class II gaming activities on its lands under the auspices of the National Indian Gaming Commission ("NIGC"), the federal regulatory body created by IGRA. Texas was aware of and did not object to the NIGC's oversight of the Tribe's Class II gaming activities. The State participated in activities necessary for the NIGC to approve the Class II management agreement. The State also offered to negotiate a compact pursuant to IGRA for Class III lottery and pari-mutuel racing.

At the time of the Pueblo's suit, a majority of the families of the 1300-member Pueblo were impoverished. A March 1993 income analysis of tribal members indicated that 68% of the heads of households had less than $15,000 in annual income, with an additional 16% earning less than $5,000 annually. Appendix at 30a-31a.[4] The Pueblo looked to gaming revenue to improve the lives of its members and has continued its gaming activities believing such are not

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[4] The affidavit of Miguel Pedraza was filed with the Fifth Circuit in the referenced appeal in support of the Pueblo's Motion for Expedited Appeals Procedures.

"prohibited under the laws of the State of Texas." *See* 25 U.S.C. § 1300g-6(a).

It is now common knowledge in the community that not only has the Pueblo's gaming activities improved the lives of its members, but that such activities have proved "to be a boon" to the surrounding area and economy. *See* Appendix at 33a-34a. Nonetheless, the Attorney General of Texas filed an Original Complaint for Injunctive Relief on September 27, 1999, bringing a federal cause of action pursuant 25 U.S.C. § 1300g-6 to enjoin Pueblo-sponsored gaming activities on its reservation.

Petitioners filed their original 12(b) Motion to Dismiss contending, among other things, that their tribal-sovereign immunity from suit barred the action, to wit: Ysleta del Sur Pueblo is a federally recognized Indian tribe; that it possesses immunity from suit; that it has not waived its immunity; that Congress did not abrogate its immunity by granting the State limited jurisdiction in 25 U.S.C. § 1300g-4(f); that Congress did not abrogate the Pueblo's immunity in the gaming provisions found at 25 U.S.C. § 1300g-6 or, if it did, Congress conditioned its exercise on specific authorization of the suit by the State; that the State of Texas, through its legislature, has not specifically authorized this suit and thus has not exercised its power under the conditional abrogation; that the governing body, regulatory agency, and officials of the Pueblo share in its immunity; and, that *Ex parte Young* type relief against the individuals is not appropriate. Petitioners also argued that the Attorney General lacked authority to prosecute the action on behalf of the State. Petitioners' argument that the Attorney General lacks authority to bring the suit is separate from and in addition to their argument that the state legislature has not specifically authorized this suit in the first instance.

The district court denied Petitioners' motion to dismiss on the basis of sovereign immunity in its Order Regarding

Defendants' Motion to Dismiss (the "December Order"), holding that 25 U.S.C. § 1300g-6(a)-(c) constitutes an unequivocal and, apparently, unconditional abrogation of tribal immunity, and that the decision in *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680-681 (5th Circuit 1999) permits injunctive relief when brought against the Tribe and its officials. The court did, however, order the Attorney General to replead and specify his authority to prosecute this action.

On December 16, 1999, the Attorney General filed the First Amended Complaint for Injunctive Relief; the next day the district court ordered Petitioners to file an answer to it. Before filing their answer, Petitioners filed a Supplemental Rule 12(b) Motion to Dismiss on January 7, 2000, contending that the Attorney General did not simply specify his authority in the new pleading, but that he also brought a new state law claim by requesting that Petitioners be enjoined pursuant to Chapter 125 of the Texas Civil Practices and Remedies Code (public and common nuisance). Tex. Civ. Proc. & Rem. Code. Ann. § 125.001 *et seq.* Petitioners argued that whatever abrogation of immunity might be contained in section 1300g-6, it did not extend to the state law claim and, in fact, section 1300g-6(b) specifically prohibited the application of such laws to gaming activities on the Pueblo's lands.

The district court denied Defendants' Supplemental Motion to Dismiss on January 13, 2000 (the "January Order"), holding that Chapter 125 constituted sufficient authority for the Attorney General to seek injunctive relief under the Restoration Act.

Petitioners appealed both orders. In their Briefs filed with the Court of Appeals and at oral argument, Defendants only addressed the denial of their motions to dismiss based on tribal immunity. Included in the arguments was their "conditional-abrogation" contention that the state legislature must specifically authorize the bringing of this particular action. The Court of Appeals affirmed the district court's

holding that section 1300g-6(c) represents a clear abrogation by Congress of the Tribe's immunity for an action to enjoin violations of the act. The Fifth Circuit did not address the conditional-abrogation theory, apparently construing it as a lack of authority argument which was not reviewable at that time. Presumably for the same reason, the Fifth Circuit did not determine whether Congress abrogated Petitioners' immunity with respect to a state law claim.

ARGUMENT

1. Neither this Court nor any of the other Courts of Appeals have traveled as far as the Fifth Circuit to find congressional abrogation of a tribe's immunity from suit.

Congressional abrogation of tribal immunity must be express, unequivocal, and appear on the face of the legislation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). "Unequivocal" means capable of being understood in only one way. Black's Law Dictionary (West Publishing Co. 5th ed. 1979). If section 1300g-6(c) is susceptible to a reasonable interpretation which does not abrogate the Pueblo's tribal immunity, federal law requires the adoption of such interpretation. Since such a reasonable interpretation exists, the Fifth Circuit erred in affirming the district court's rulings.

The Restoration Act's gaming provisions, 25 U.S.C. § 1300g-6, preempts state law on the matter. Under the general grant of jurisdiction in the Restoration Act, 25 U.S.C. § 1300g-4(f), the state exercises Public Law 280 type jurisdiction, *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 685 (5th Cir. 1999), which includes criminal offenses committed by or against Indians but not Indian tribes. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1986). Section 1300g-6, however, preempted such jurisdiction with respect to gaming. *Ysleta del Sur Pueblo v.*

State of Texas, 36 F.3d 1325, 1329 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995) (the Senate Report accompanying the legislation stated that the central purpose of the provision is to treat gaming on the reservation "as a matter of federal law.")

The Restoration Act preempts state law by creating a federal prohibition (which references state law) and creates federal penalties for violation of the federal law, including criminal sanctions. 25 U.S.C. § 1300g-6(a). A reasonable interpretation of section 1300g-6(c) is that Congress has permitted the state to seek injunctive relief for violation of the federal gaming prohibition against those over whom the state would have had jurisdiction under section 1300g-4(f) if Congress had not preempted such jurisdiction under section 1300g-6(a).[5] Because the state had no jurisdiction over the Pueblo under section 1300g-4(f), there is no warrant to conclude that Congress abrogated the Pueblo's tribal immunity from suit. Just because Congress makes a federal statute applicable to Indian tribes, and just because Congress provides that violations of the statute may be enjoined, does not mean that Congress has waived the tribes' immunity from suit. *See Florida Paraplegic Associations, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129-1132 (11th Cir. 1999) (in which, the Court held the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.*, applied to Indian tribes, but that sovereign immunity barred any suit otherwise authorized by the statute). Because a reasonable interpretation of section 1300g-6(c) exists which does not abrogate the Pueblo's tribal immunity, the statute is not unequivocal and the case should be dismissed.

In those cases in which a court has found a waiver of tribal immunity, the federal legislation clearly indicated that it was

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[5] As a general rule, a court may not enjoin the commission of a crime. *See In re Debbs*, 158 U.S. 564, 593 (1895).

the tribe, and not some other party, which was to be subject to suit. In *Public Service Co. v. Shoshone-Bannock Tribes*, 30 F.3d 1203 (9th Cir.1994), and *Northern States Power Co. v. Prairie Island Medwakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir.1993), the courts found abrogation of tribal immunity in the Hazardous Materials Transportation Uniform Safety Act of 1990 ("HMTUSA"), 49 U.S.C. § 1801 *et seq.* (repealed 1994). While in effect, the statute provided that "[a]ny person, including a State or political subdivision thereof or Indian tribe, directly affected by any requirement of a State or political subdivision or Indian tribe, may apply to the Secretary [of Energy] . . . for [an administrative] determination of whether that requirement is preempted by [federal law]." 49 U.S.C. § 1811(c)(1). The statute also stated that "[n]othing in [this section] prohibits a State or political subdivision thereof or Indian tribe, or any other person directly affected by any requirement of a State or political subdivision thereof or Indian tribe, from seeking a determination of preemption in any court of competent jurisdiction in lieu of applying to the Secretary under paragraph (1)." 49 U.S.C. § 1811(c)(2). No party other than a governmental entity attempting to regulate transportation of hazardous material would be a proper party for determination of pre-emption by federal law of such regulation.

In *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir.1989) and *Washington Department of Ecology v. United States Environmental Protection Agency*, 752 F.2d 1465, 1469 (9th Cir.1985) the courts found abrogation of tribal immunity in the definitional scheme employed in the Resource Conservation and Recovery Act of 1976 ("RCRA"). In an attempt to remedy pollution caused by improper disposal of hazardous and solid waste, the act authorizes citizens to bring suits to force compliance with the statute "against any person . . . who is alleged to be in violation [of the statute's substantive provisions]." 42 U.S.C. § 6972(a)(1)(A). The definition of "person" includes a

"municipality," which in turn encompasses "an Indian tribe" by express statutory delineation. 42 U.S.C. § 6903(13), (15). *See also Osage Tribal Council v. United States Department of Labor*, 187 F.3d 1774, 1181-1183 (10th Cir. 1999), in which the court relied the same type of definitional scheme to find abrogation of tribal immunity in the whistle blower provisions in the Safe Drinking Water Act, 42 U.S.C. §§ 300f(10) and (12), 300j-9(I)(2)(A).

In each of the cases, the statutes either named Indian tribes as proper parties or the only logical party against whom relief could be sought was a governmental entity such as an Indian tribe. The same cannot be said of section 1300g-6(c) of the Restoration Act. The Eleventh Circuit faced a similar situation in *Florida Paraplegic* where it found that the American with Disabilities Act did not abrogate tribal immunity even though the substantive provisions of the act applied to Indian tribes. 166 F.3d at 1129-1132.

Other courts have acted likewise in refusing to find congressional abrogation of tribal immunity absent the circumstances set forth above. *See, e.g., Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263-1265 (10th Cir. 1998) (Ute Partition and Termination Act of 1954, 25 U.S.C. §§ 677-677aa); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.), *cert. denied*, 513 U.S. 919 (1994) (Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701-1716); *Wampanoag Tribe of Gay Head (Aquinnah) v. Massachusetts Commission Against Discrimination*, 63 F. Supp. 2d 119 (D. Mass. 1999) (Massachusetts Indian Land Claims Settlement Act, 25 U.S.C. §§ 1771-1726); *Buchanan v. Sokogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1046-1048 (E.D. Wis. 1999) (Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*); and *Superior Oil Co. v. United States*, 605 F. Supp. 674, 678-680 (D. Ut. 1985), *rev'd on*

other grounds, 798 F.2d 1324 (10th Cir. 1995) (Omnibus Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g).

2. The decision of the Fifth Circuit disrupts the careful balance of federal, tribal, and state interests struck by Congress in the gaming provisions' enforcement scheme.

Suit against Petitioners under section 1300g-6 is a public policy decision which must be enabled by the state legislature. Even if section 1300g-6(c) is an abrogation of the Pueblo's immunity, which the Pueblo does not concede, such provisions are strictly construed. *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999). The enforcement scheme is part and parcel of the federal pre-emption of state law concerning gaming on the Pueblo's reservation. This Court recognizes that the history of tribal sovereignty serves as a necessary "backdrop" in examining congressional intent to preempt state law on an Indian reservation, with each case requiring a "particularized examination of the relevant state, federal, and tribal interest." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989), quoting *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982). Such a "particularized examination" is lacking in both lower courts' analysis.

The language of section 1300g-6(c) is clear—Congress said the "State of Texas" and not the "Attorney General of the State." Congress knows how to grant state attorney generals such authority if it so desires. *See* 15 U.S.C. § 15c(1)(a) ("Any attorney general of a State may bring a civil action[.]") The language used in section 1300g-6(c) is comparable to that employed in the Indian Gaming Regulatory Act: "Any State and any Tribe may enter into a Tribal-State compact[.]" 25 U.S.C. § 2710(d)(3)(B). Two Tribal-State compacts, each agreed to by the governors of the states, have been struck down because they were not approved by the legislatures of

the states. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir.), *cert. denied*, 522 U.S. 807 (1997); *Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992).

The Restoration Act vests the public policy decision to sue this federally protected Indian tribe with the regular public policy decision maker of the State—its legislature. In balancing the interests of the federal government, the Pueblo, and the State, Congress appropriately restricted to the state legislature the important public policy decision to sue the Pueblo. It is for the state Legislature to specifically authorize a new Indian war. It is not the prerogative of the Attorney General to establish the public policy of cooperation or conflict between these two sovereigns, the State and the Pueblo.

Congress also provided in the Restoration Act that the State of Texas is authorized to enact special legislation and to perform any services benefitting the Pueblo not inconsistent with the provisions of the Restoration Act. 25 U.S.C. § 1300g-3(a). Does the Attorney General contend that section 1300g-3(a) authorizes him to perform such tasks? Of course not, because he has no power to establish the public policy of Texas. Texas law specifically provides that the Attorney General lacks authority to bind the State:

> An admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state.

Tex. Gov't. Code Ann. § 402.004 (Vernon's 1998). This section creates two problems for the Attorney General. First, he does not and cannot make public policy for the State. Second, his actions are ineffective to bind the State. In the instant case, the attorney general is seeking to establish the public policy of the state. He does not have that power. In *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S.

1071 (1994), the attorney general was seeking to impose his views on the outcome of the judicial election lawsuit. The *en banc* decision noted that the attorney general had the authority and duty to represent state officials in the suit, but he did not have the power to make the policies for the state. If he had such powers he would be the state. *Id.* at 842.

3. By allowing the State to pursue a state law claim against the Pueblo, the Fifth Circuit has granted the State civil regulatory jurisdiction over gaming on the Pueblo's reservation in conflict with the clear language of section 1300g-6(b).

Congressional abrogation of tribal immunity is to be strictly construed. *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999). Any abrogation of immunity from suit is limited to the right of action created in section 1300g-6(c). Nothing in section 1300g-6 suggests that Congress has permitted state law claims be brought against Petitioners. In fact section 1300g-6(b) provides that nothing in section 1300g-6 shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas. Nonetheless, the Fifth Circuit is permitting the State to seek an injunction against the Petitioners under Chapter 125 of the Texas Civil Practices and Remedies Code (public and common nuisance). Tex. Civ. Prac. & Rem. Code Ann. § 125.001 *et seq.* Of course, allowing Texas to pursue state law claims in contravention of a Congressional directive otherwise destroys the careful balancing of federal, tribal, and state interests crafted by Congress in section 1300g-6.

CONCLUSION

Petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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